

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 599 Public Works Projects

SPONSOR(S): Oversight, Transparency & Administration Subcommittee; Williamson and others

TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 534

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|--|---------------------|---------|--|
| 1) Oversight, Transparency & Administration Subcommittee | 13 Y, 0 N, As CS | Moore | Harrington |
| 2) Local, Federal & Veterans Affairs Subcommittee | 9 Y, 5 N | Darden | Miller |
| 3) Government Accountability Committee | | Moore | Williamson |

SUMMARY ANALYSIS

Contracts for construction services that are projected to cost more than a specified threshold must be competitively awarded. Specifically, state contracts for construction projects that are projected to cost in excess of \$200,000 must be competitively bid. Counties, municipalities, special districts, or other political subdivisions seeking to construct or improve a public building must competitively bid the project if the estimated cost exceeds \$300,000. The solicitation of competitive bids or proposals must be publicly advertised in the Florida Administrative Register.

The bill creates s. 255.0992, F.S., relating to public works projects. The bill defines the terms “political subdivision” and “public works project.” It prohibits the state or a political subdivision, except when required by state or federal law, from requiring a contractor, subcontractor, or material supplier or carrier engaged in a public works project to:

- Pay employees a predetermined amount of wages or prescribe any wage rate;
- Provide employees a specified type, amount, or rate of employee benefits;
- Control, limit, or expand staffing; or
- Recruit, train, or hire employees from a designated, restricted, or single source.

In addition, the bill provides that the state or a political subdivision that contracts for a public works project may not prohibit a contractor, subcontractor, or material supplier or carrier from submitting a bid on the project or being awarded the relevant contract if such individual is otherwise qualified to do the work described. This provision does not apply to vendors that have been convicted of a public entity crime or have been found to have committed discrimination.

The bill’s prohibitions apply only to public works projects of which 50 percent or more of the cost will be paid from state-appropriated funds that were appropriated at the time of the competitive solicitation.

The bill does not apply to contracts executed by the Department of Transportation under ch. 337, F.S.

The bill does not appear to have a fiscal impact on the state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Federal Labor and Wage Laws

The National Labor Relations Act of 1935¹ and the Labor Management Relations Act of 1947² constitute a comprehensive scheme of regulations guaranteeing employees the right to organize, to bargain collectively through chosen representatives, and to engage in concerted activities to secure their rights in industries involved in or affected by interstate commerce.

The Fair Labor Standards Act (FLSA or act) establishes a federal minimum wage, which is the lowest hourly wage that can be paid in the United States.³ A state may set the rate higher than the federal minimum, but not lower.⁴ The act also requires employers to pay time and a half to their employees for overtime hours worked,⁵ and establishes standards for recordkeeping⁶ and child labor.⁷ Over 135 million workers are covered under the act;⁸ most, but not all, jobs are covered by the FLSA. In addition, some jobs covered by the act are considered “exempt” from the FLSA overtime requirements.⁹

On February 12, 2014, President Obama signed Executive Order 13658, which establishes a minimum wage for certain federal contractors.¹⁰ The Executive Order requires parties who contract with the federal government to pay workers performing work on or in connection with covered federal contracts at least \$10.10 per hour beginning January 1, 2015. Beginning January 1, 2016, and annually thereafter, such workers must be paid an amount determined by the Secretary of Labor in accordance with the Executive Order. The order stated that “[r]aising the pay of low-wage workers increases their morale and the productivity and quality of their work, lowers turnover and its accompanying costs, and reduces supervisory costs.”¹¹ The Executive Order hourly minimum wage in effect from January 1, 2017, through December 31, 2017, is \$10.20.¹²

The Davis-Bacon Act¹³ applies to contractors and subcontractors performing on federally funded or assisted contracts in excess of \$2,000 for the construction, alteration, or repair (including painting and

¹ 29 U.S.C. ss. 151-169 (encouraging the practice and procedure of collective bargaining and protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection).

² 29 U.S.C. ss. 141-197 (prescribing the rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce).

³ 29 U.S.C. s. 206.

⁴ 29 U.S.C. s. 218(a).

⁵ 29 U.S.C. s. 207(a)(1).

⁶ 29 U.S.C. s. 211.

⁷ 29 U.S.C. s. 212.

⁸ United States Department of Labor, *Wage and Hour Division: Resources for Workers*, <http://www.dol.gov/whd/workers.htm> (last visited Feb. 24, 2017).

⁹ 29 U.S.C. s. 213; United States Department of Labor, *Fact Sheet #14: Coverage Under the Fair Labor Standards Act (FLSA)*, www.dol.gov/whd/regs/compliance/whdfs14.pdf (last visited Feb. 24, 2017).

¹⁰ Exec. Order 13658, 79 Fed. Reg. 9851 (Feb. 12, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/02/12/executive-order-minimum-wage-contractors> (last visited Mar. 11, 2017).

¹¹ *Id.*

¹² 81 Fed. Reg. 64513 (Sept. 20, 2016), *available at* <https://www.gpo.gov/fdsys/pkg/FR-2016-09-20/pdf/2016-22515.pdf> (last visited Mar. 11, 2017).

¹³ Davis-Bacon Act, 40 U.S.C. s. 3141-3148.

decorating) of public buildings or public works.¹⁴ Contractors and subcontractors subject to the Davis-Bacon Act are required to pay their laborers and mechanics employed under the contract no less than the locally prevailing wages and fringe benefits for corresponding work on similar projects in the area, as determined by the Department of Labor.¹⁵ The Davis-Bacon Act applies to contractors and subcontractors performing work on federal or District of Columbia contracts.¹⁶ Many federal laws that authorize federal assistance for construction through grants, loans, loan guarantees, and insurance are referred to as Davis-Bacon “related Acts.”¹⁷ The “related Acts” include provisions that require the prevailing wage provisions of the Davis-Bacon Act to apply to most federally assisted construction.¹⁸

State Labor and Wage Regulations

The State Constitution protects the right for workers to collectively bargain, including public sector employees.¹⁹ It provides, in pertinent part, that “[t]he right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged.” The Florida Supreme Court has held that public employees maintain the same rights to collectively bargain as do private employees.²⁰

In addition, the State Constitution provides that “[a]ll working Floridians are entitled to be paid a minimum wage that is sufficient to provide a decent and healthy life for them and their families, that protects their employers from unfair low-wage competition, and that does not force them to rely on taxpayer-funded public services in order to avoid economic hardship.”²¹ Employers must pay employees no less than the minimum wage for all hours worked in Florida.²² The current state minimum wage is \$8.10 per hour,²³ which is higher than the federal rate.²⁴

Procurement of Construction Services

Chapter 255, F.S., specifies the procedures to be followed in the procurement of construction services for public property and publicly owned buildings. The Department of Management Services is responsible for establishing by rule the following:

- Procedures for determining the qualifications and responsibility of potential bidders prior to advertising for and receiving bids for building construction contracts;
- Procedures for awarding each state agency construction project to the lowest qualified bidder;
- Procedures to govern negotiations for construction contracts and contract modifications when such negotiations are determined to be in the best interest of the state; and
- Procedures for entering into performance-based contracts for the development of public facilities when those contracts are determined to be in the best interest of the state.²⁵

¹⁴ United States Department of Labor, *Wage and Hour Division: Davis-Bacon and Related Acts*, <http://www.dol.gov/whd/govcontracts/dbra.htm> (last visited Feb. 24, 2017).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ United States Department of Labor, *Fact Sheet #66: The Davis-Bacon and Related Acts (DBRA)*, <http://www.dol.gov/whd/regs/compliance/whdfs66.pdf> (last visited Feb. 24, 2017). Examples of “related Acts” are the Federal Aid Highway Acts, the Housing and Community Development Act of 1974, and the Federal Water Pollution Control Act.

¹⁸ *Id.*

¹⁹ Art. I, s. 6, FLA. CONST.

²⁰ See *Hillsborough Cnty. Gov’tl Emps. Ass’n, Inc. v. Hillsborough Cnty. Aviation Auth.*, 522 So. 2d 358 (Fla. 1988); *City of Tallahassee v. Public Employees Relations Comm’n*, 410 So. 2d 487 (Fla. 1981); *Dade Cnty. Classroom Teachers Ass’n v. Legislature of Fla.*, 269 So. 2d 684 (Fla. 1972).

²¹ Art. X, s. 24(a), FLA. CONST.

²² Art. X, s. 24(c), FLA. CONST.

²³ Department of Economic Opportunity, *Display Posters and Required Notices*, <http://www.floridajobs.org/business-growth-and-partnerships/for-employers/display-posters-and-required-notice> (last visited Feb. 24, 2017).

²⁴ The federal minimum wage is \$7.25 per hour. For more information about federal minimum wage provisions, see <http://www.dol.gov/whd/minimumwage.htm> (last visited Feb. 24, 2017).

²⁵ Section 255.29, F.S.

State contracts for construction projects that are projected to cost in excess of \$200,000 must be competitively bid.²⁶ A county, municipality, special district, or other political subdivision seeking to construct or improve a public building must competitively bid the project if the estimated cost is in excess of \$300,000.²⁷

Section 255.0525, F.S., requires the solicitation of competitive bids or proposals for any state construction project that is projected to cost more than \$200,000 to be publicly advertised in the Florida Administrative Register (FAR) at least 21 days prior to the established bid opening. If the cost of the construction project is projected to exceed \$500,000, the advertisement must be published in the FAR at least 30 days prior to the bid opening, and at least once in a newspaper of general circulation in the county where the project is located at least 30 days prior to the bid opening.²⁸

Florida law provides a preference for the employment of state residents in construction contracts funded with state funds. Such contracts must contain a provision requiring the contractor to give preference to employing state residents to perform the work if such residents have substantially equal qualifications²⁹ to those of non-residents.³⁰ If a construction contract is funded by local funds, the contract may, but is not required to, contain such a provision.³¹ In addition, a contractor required to employ state residents must contact the Department of Economic Opportunity to post the contractor's employment needs in the state's job bank system.³²

For a competitive solicitation for construction services in which 50 percent or more of the cost will be paid from state-appropriated funds, a state college, county, municipality, school district, or other political subdivision of the state may not use a local ordinance or regulation that provides a preference based upon:

- The contractor's maintaining an office or place of business within a particular local jurisdiction;
- The contractor's hiring employees or subcontractors from within a particular local jurisdiction; or
- The contractor's prior payment of local taxes, assessments, or duties within a particular local jurisdiction.³³

Several counties and municipalities have adopted ordinances requiring companies bidding on contracts to pay their employees a "living wage,"³⁴ while others have adopted ordinances requiring apprenticeship programs.³⁵

Department of Transportation Construction Projects

Chapter 337, F.S., governs contracting by the Department of Transportation (DOT). Any person who wants to bid for a construction contract in excess of \$250,000 must be certified by DOT as qualified.³⁶ Certification is also required to bid on road, bridge, or public transportation construction projects of more than \$250,000.³⁷ The purpose of certification is to ensure professional and financial competence

²⁶ See s. 255.0525, F.S.; see also chapters 60D-5.002 and 60D-5.0073, F.A.C.

²⁷ Section 255.20(1), F.S. For electrical work, local governments must competitively bid projects estimated to cost more than \$75,000.

²⁸ For counties, municipalities, and political subdivisions, similar publishing provisions apply. See Section 255.0525(2), F.S.

²⁹ Section 255.099(1)(a), F.S., defines substantially equal qualifications as the "qualifications of two or more persons among whom the employer cannot make a reasonable determination that the qualifications held by one person are better suited for the position than the qualifications held by the other person or persons."

³⁰ Section 255.099(1), F.S.

³¹ *Id.*

³² Section 255.099(1)(b), F.S.

³³ Section 255.099(2), F.S.

³⁴ See, e.g., Broward County Code of Ordinances s. 26-102, Palm Beach County Code of Ordinances s. 2-147 to 2-250.1, Miami-Dade County Code of Ordinances s. 2-8.9.

³⁵ See Charlie Frago, *St. Pete council approves mandatory apprentice program for city projects*, Tampa Bay Times (May 7, 2015), available at <http://www.tampabay.com/news/localgovernment/st-pete-council-approves-mandatory-apprentice-program-for-city-projects/2228783> (last visited Mar. 11, 2017).

³⁶ Section 337.14(1), F.S. and ch. 14-22, F.A.C.

³⁷ Section 337.14(2), F.S.

relating to the performance of construction contracts by evaluating bidders “with respect to the equipment, past record, experience, financial resources, and organizational personnel of the applicant necessary to perform the specific class of work for which the person seeks certification.”³⁸

Effect of Proposed Changes

The bill creates s. 255.0992, F.S., relating to public works projects. It defines the following terms:

- “Political subdivision” means a separate agency or unit of local government created or established by law or ordinance and the officers thereof. The term includes, but is not limited to, a county; a city, town, or other municipality; or a department, commission, authority, school district, taxing district, water management district, board, public corporation, institution of higher education, or other public agency or body thereof authorized to expend public funds for construction, maintenance, repair, or improvement of public works.
- “Public works project” means an activity of which 50 percent or more of the cost will be paid from state-appropriated funds that were appropriated at the time of the competitive solicitation and which consists of the construction, maintenance, repair, renovation, remodeling, or improvement of a building, road, street, sewer, storm drain, water system, site development, irrigation system, reclamation project, gas or electrical distribution system, gas or electrical substation, or other facility, project, or portion thereof that is owned in whole or in part by any political subdivision.

The bill provides that except as required by federal or state law, the state or any political subdivision that contracts for a public works project may not require a contractor, subcontractor, or material supplier or carrier engaged in the project to:

- Pay employees a predetermined amount of wages or prescribe any wage rate;
- Provide employees a specified type, amount, or rate of employee benefits;
- Control, limit, or expand staffing; or
- Recruit, train, or hire employees from a designated, restricted, or single source.

In addition, the bill provides that the state or any political subdivision that contracts for a public works project may not prohibit any contractor, subcontractor, or material supplier or carrier from submitting a bid on the project or being awarded the relevant contract if such individual is able to perform the work described and is qualified, licensed, or certified as required by state law. The bill specifies that this provision does not apply to vendors listed in ss. 287.133³⁹ and 287.134, F.S.⁴⁰

The bill does not apply to contracts executed by DOT under ch. 337, F.S.

B. SECTION DIRECTORY:

Section 1. creates s. 255.0992, F.S., relating to public works projects.

Section 2. provides an effective date of July 1, 2017.

³⁸ Section 337.14(1), F.S.

³⁹ Section 287.133, F.S., prohibits a vendor that has been convicted of a public entity crime from being awarded or performing work as a contractor, supplier, subcontractor, or consultant under a contract with the state, any of its departments or agencies, or any political subdivision.

⁴⁰ Section 287.134, F.S., prohibits an entity that has been found by a court to have committed discrimination based on race, gender, national origin, disability, or religion from being awarded or performing work as a contractor, supplier, subcontractor, or consultant under a contract with the state or any department or agency of the state.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to impact state revenues.

2. Expenditures:

The bill does not appear to impact state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to impact local government revenues.

2. Expenditures:

The bill does not appear to impact local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill neither provides rulemaking authority nor requires implementation by executive branch rulemaking.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 8, 2017, the Oversight, Transparency & Administration Subcommittee adopted two amendments and reported the bill favorably as a committee substitute. The amendments:

- Revised the definition of “public works project” so that it only includes activities of which 50 percent or more of the cost will be paid from state-appropriated funds that were appropriated at the time of the competitive solicitation; and
- Clarified that although the state or a political subdivision that contracts for a public works project may not prohibit any contractor, subcontractor, or material supplier or carrier from submitting a bid or being awarded the contract if such individual is qualified and able to perform the work, this provision does not apply to vendors listed in ss. 287.133 and 287.134, F.S.

This analysis is drafted to the committee substitute as approved by the Oversight, Transparency & Administration Subcommittee.